UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

RANGER INSURANCE COMPANY, as Subrogee of Ag Partners, L.L.C., Plaintiff, vs. FARMERS NATIONAL COMPANY, TERRENCE MEYER, and LORRAINE UNRUH, Defendants.	No. C03-4100-PAZ **MEMORANDUM OPINION AND ORDER ON DEFENDANT UNRUH'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This matter is before the court on a motion for summary judgment filed by the defendant Lorraine Unruh. Unruh filed her motion, a supporting Affidavit, and a brief on November 5, 2004. (Doc. No. 19) She filed a statement of undisputed material facts on November 12, 2004. (Doc. No. 20) On December 6, 2004, the plaintiff Ranger Insurance Company ("Ranger") filed its resistance (Doc. No. 21), response to Unruh's statement of facts (Doc. No. 22), a statement of additional material facts (Doc. No. 23), a brief (Doc. No. 24), and an appendix in the form required by Local Rule 56.1 (Doc. No. 25).

On December 9, 2004, Unruh filed an amended statement of material facts (Doc. No. 26), an Appendix (Doc. Nos. 27-36), a reply brief (Doc. No. 37-1), and a reply to Ranger's statement of additional material facts (Doc. No. 37-2). Due to the late filing of Unruh's appendix and the amendment to her statement of material facts, the court provided

Ranger with an opportunity to file any supplemental response it deemed appropriate. On December 16, 2004, Ranger filed a letter (Doc. No. 39) indicating it would not file a supplemental response.

The matter is now fully submitted and the court turns to consideration of Unruh's motion for summary judgment.

Preliminarily, as Ranger has pointed out, Unruh's motion was filed after the dispositive motion deadline specified in the court's scheduling order. (*See* Doc. No. 15, setting a dispositive motion deadline of October 29, 2004.) Unruh offers no explanation for the late filing, but asks in her reply brief that the court consider her motion timely filed. Not only was Uhruh's motion filed untimely, but Unruh also failed to follow proper form in setting forth her statement of facts (including more than one factual assertion per paragraph), and in failing to file a timely appendix.

Nevertheless, Ranger has responded fully to the motion, and the court finds consideration of the motion would benefit the parties and the court by clarifying the issues to be tried in the case. Therefore, the court **grants** Unruh's request that her motion be deemed timely filed.

II. FACTUAL BACKGROUND

This case arises from an incident that occurred on November 5, 2001, when a bridge on private farmland owned by Unruh collapsed under the weight of a large piece of commercial equipment called a Terragator. The Terragator was owned by Ag Partners, L.L.C. ("Ag Partners"). The Terragator fell into a creek below the bridge and was damaged beyond repair, resulting in damages to Ag Partners in excess of $119,000.

The Terragator was on Unruh's property for the purpose of applying fertilizer to the farm. Application of the fertilizer had been requested by the defendant Terrence

Meyer, who leased the farm from Unruh. The farm was managed for Unruh by the defendant Farmers National Company ("Farmers"). Ranger made certain payments to Ag Partners for the damage to the Terragator. In this action, Ranger seeks to recoup those payments from the defendants.

Unruh has moved for summary judgment , arguing she "had surrendered possession and control of the subject property" to her codefendants, and she neither owed nor breached any duty to Ag Partners and has no liability in connection with the incident.

Ranger argues the facts are unclear as to whether Unruh maintained control of the property, and in any event, Unruh is liable for any negligent acts or omissions of Farmers under principles of agency law. Ranger further argues that because Unruh stood to profit from the service performed by Ag Partners (by virtue of Unruh's receipt of a percentage of profits from Meyer's farming operation), Ag Partners was Unruh's business invitee and "Unruh owed Ag Partners a non-delegable duty to keep the property in a reasonable safe condition." (Doc. No. 24, at 7)

Unruh responds that there is no evidence a dangerous condition, in fact, existed on the property, and even if that were the case, there is no evidence Unruh could or should have discovered a dangerous condition or latent defect in the bridge. She therefore claims she had no duty to warn Ag Partners. (*See* Doc. No. 37-1)

These are the issues the court must decide in connection with Unruh's motion for summary judgment.

III. STANDARDS FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment and provides that either party to a lawsuit may move for summary judgment

without the need for supporting affidavits. *See* Fed. R. Civ. P. 56(a), (b). Rule 56 further states that summary judgment:

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). A court considering a motion for summary judgment "must view all of the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts." *Webster Indus., Inc. v. Northwood Doors, Inc.*, 320 F. Supp. 2d 821, 828 (N.D. Iowa 2004) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); and *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996)).

The party seeking summary judgment must "'inform[ ] the district court of the basis for [the] motion and identify[ ] those portions of the record which show lack of a genuine issue.'" *Webster Indus.*, 320 F. Supp. 2d at 829 (quoting *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992), in turn citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)). A genuine issue of material fact is one with a real basis in the record. *Id.* (citing *Hartnagel*, 953 F.2d at 394, in turn citing *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356). Once the moving party meets its initial burden under Rule 56 of showing there is no genuine issue of material fact, the nonmoving party, "by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Webster Indus*, 320 F. Supp. 2d at 829 (citing, *inter alia*, *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553; and *Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997)).

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the Supreme Court has explained that the nonmoving party must produce sufficient evidence to permit "a reasonable jury [to] return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Furthermore, the Supreme Court has held the trial court must dispose of claims unsupported by fact and determine whether a genuine issue exists for trial, rather than weighing the evidence and determining the truth of the matter. *See Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510; *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2552-53; *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356.

The Eighth Circuit recognizes that "summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990) (citing Fed. R. Civ. P. 56(c)). The Eighth Circuit, however, also follows the principle that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* (quoting *Celotex*, 477 U.S. at 327, 106 S. Ct. at 2555); *see also Hartnagel*, 953 F.2d at 396.

Thus, the trial court must assess whether a nonmovant's response would be sufficient to carry the burden of proof at trial. *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552). If the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party is "entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552; *Woodsmith Pub. Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990). However, if the court can conclude that a reasonable jury could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*,

477 U.S. at 248, 106 S. Ct. at 2510; *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Woodsmith*, 904 F.2d at 1247.

IV. DISCUSSION

Factually, the "fighting issue" between the parties relates to whether Unruh maintained control of the property. Under Iowa law, a property owner must retain control of the property for the owner to owe a duty of care to a lessee's invitee, and to be held liable for any breach of such a duty. *Poyzer v. McGraw*, 360 N.W.2d 748, 751 (Iowa 1985) (citing *Coleman v. Hall*, 161 N.W.2d 329, 333 (Iowa 1968); *Shill v. Careage Corp.*, 353 N.W.2d 416, 420 (Iowa 1984)); *Wright v. Peterson*, 146 N.W.2d 617, 620 (Iowa 1967). The owner's control need not be absolute, but may be joint control with a tenant or management company. *See Blow v. Martin Bros.*, 2001 WL 803759 (Iowa Ct. App. 2001); *Stupka v. Scheidel*, 56 N.W.2d 874, 877 (Iowa 1953).

The parties agree Ag Partners was the invitee of codefendant Meyer (although, as discussed below, Ranger also argues Ag Partners was Unruh's business invitee, as well). Therefore, the question is whether or not Unruh maintained control of the property. If so, further questions arise as to whether Unruh knew or should have known of the bridge's condition and any unreasonable risk of injury it posed to Ag Partners, and if so, whether she was negligent in failing to warn Ag Partners of the risk.

In her original Answer to Ranger's Complaint, Unruh admitted Ranger's assertion that Unruh "at all relevant times owned *and controlled* the property. . . ." (Complaint, Doc. No. 1, ¶ 3 (emphasis added); *see* Answer, Doc. No. 8, ¶ 3)

Unruh later moved to amend her Answer, asserting her counsel had conducted a more thorough investigation into the facts underlying the case and had determined that Unruh had surrendered control of the property "to Defendant, Terrence Meyer, pursuant

to a farm lease." (Doc. No. 16, p. 1) The court granted the motion, and Unruh amended her Answer with regard to paragraph three of the Complaint, admitting she owned the subject property but denying that she controlled the property. (*See* Doc. No. 18, ¶ 3) In her summary judgment papers, Unruh claims "it is clear that she surrendered control of the property to Defendants Farmers National and Meyer, notwithstanding the improvident admission of control in Defendant Unruh's original Answer." (Doc. No. 37-1, p. 2)

Ranger, on the other hand, argues the discrepancy between Unruh's original and amended Answers presents a fact question for the jury. Ranger cites Iowa law for this proposition, which provides that the withdrawal of an admission does not "erase it," and it is "for the jury to sort through the admission, its withdrawal, and [the party's] explanation and determine the weight to give to it." *Poyzer*, 360 N.W.2d at 752 (citing *Katcher v. Heidenwirth*, 254 Iowa 454, 466-67, 118 N.W.2d 52, 59 (1962)). This court is not bound by Iowa law regarding the effect of a withdrawn pleading. However, it appears federal law generally is in accord. *See, e.g.*, *Garman v. Griffith*, 666 F.2d 1156, 1158 (8th Cir. 1981) (inconsistent factual allegation is admissible if it relates to conduct of same defendant who is offering the inconsistent evidence). "Once an amended pleading is interposed, the original pleading no longer performs any function in the case and therefore admissions in the superceded pleading may only be taken advantage of by introducing the pleading into evidence." *Clodfelter v. Thuston*, 637 F. Supp. 1034, 1039 (E.D. Mo. 1986) (citing *Fruco Constr. Co. v. McClelland*, 192 F.2d 241 (8th Cir. 1951), *and* C. Wright & A. Miller, *Federal Prac. & Proc.* 389-91 (1971)).

Ranger has placed Unruh's initial admission at issue by introducing Unruh's original Answer into evidence in its Appendix (Doc. No. 25, Ex. B). However, it appears the admission resulted more from a misapprehension of the facts by Unruh's counsel than by any attempt on Unruh's part to change her position in the case.

Ranger also argues Unruh's Affidavit should be disregarded because Unruh "has never been disclosed as a testifying witness in this matter," and Unruh's counsel allegedly has told Ranger's counsel "on several occasions . . . that Unruh had no information regarding the issues in this case and that her deposition would be pointless." (Doc. No. 22, ¶ 7) Ranger asserts that based on counsel's representations, it has not deposed Unruh, although it has deposed the other defendants and all disclosed experts. (*Id.*)

The court first will address Ranger's claim that Unruh "has never been disclosed as a testifying witness in this matter." No trial scheduling order has been entered yet in this case, and the court has not yet set a deadline by which the parties must exchange their witness lists. The court finds no cause to disregard Unruh's Affidavit on the basis that she has not been identified as a testifying witness.

A matter the court finds more troubling is Ranger's allegation regarding defense counsel's representation that Unruh has no relevant knowledge and does not need to be deposed in the case. Based on her Affidavit, Unruh clearly has knowledge directly relevant to the matters at issue. (*See* Doc. No. 19-2) However, despite its objection, Ranger proceeds to admit the allegations set forth in paragraph seven of Unruh's statement of material facts, which paragraph references and relies upon Unruh's Affidavit. In paragraph seven, Unruh asserts the following facts:

> As reflected in Defendant Unruh's Affidavit, she totally relied upon Farmers National Company and Terry Meyer in connection with all aspects of the management and operation of the farm, ***having surrendered control of the premises*** to Mr. Meyer. Regarding the subject bridge, Defendant Unruh had no prior involvement with or knowledge about its construction, condition, maintenance, repair or weight-bearing capacity, nor did she know equipment of the size and weight of the Terragator would or might cross the bridge for the purpose of applying fertilizer or for any other purpose.

> Finally, Defendant Unruh had no prior knowledge that fertilizer application was to take place on November 5, 2001 or any other day, nor did she know who would be performing the application, how it would be performed or the type or size of equipment which would or might be used for such application. Rather, all such arrangements were made by Defendant Meyer, the operator of the farm, without any involvement or communication on Defendant Unruh's part.

(Doc. No. 20, ¶ 7; emphasis added) These factual assertions are consistent with Unruh's interrogatory responses dated February 4, 2004. In response to all questions relating to the condition of the property and the bridge, Unruh professes to have no knowledge and defers to the other two defendants and her management agreement with Farmers. (*See* Doc. No. 25, pp. 83-93)

Even if the court accepts these facts as true, they do not defeat Ranger's claims that Unruh would retain liability under agency law, or that she owed Ag Partners a non-delegable duty to warn of dangerous conditions on the property.

Simply stated, viewing the facts in a light most favorable to Ranger, as the non-moving party, Unruh has failed to present a factual basis sufficient to prevail on her motion. The parties' summary judgment papers reveal numerous areas of disputed, material fact for consideration by the jury in this case. These include, among others, the degree of control Unruh maintained over the premises; the amount, if any, of Unruh's knowledge and information regarding the ongoing maintenance and condition of the bridge in question; and even whether a dangerous condition or latent defect existed in the bridge at all. At this juncture, the disputed facts are too numerous and too significant to warrant summary judgment in Unruh's favor.

V. CONCLUSION

For the reasons discussed above, Unruh's motion for summary judgment is **denied**. Further, the court reopens discovery in the case to allow Ranger to depose Unruh. If Ranger elects to take Unruh's deposition, it must do so by **January 18, 2005**.

The court will schedule trial by separate order.

IT IS SO ORDERED.

DATED this 17th day of December, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT